

BOARD OF SUPERVISORS
COUNTY OF YORK
YORKTOWN, VIRGINIA

Ordinance

At a regular meeting of the York County Board of Supervisors held in the Board Room, York Hall, Yorktown, Virginia, on the ____ day of _____, 2000:

Present

Vote

Walter C. Zaremba, Chairman
James S. Burgett, Vice Chairman
Sheila S. Noll
Donald E. Wiggins
Melanie L. Rapp

On motion of _____, which carried _____, the following ordinance was adopted:

AN ORDINANCE TO AMEND THE CENTRALIZED PURCHASING POLICY
FOR YORK COUNTY

WHEREAS, Sections 15.1-127 and 11-35 of the Code of Virginia authorized the Board of Supervisors to provide for the centralized competitive purchasing of all supplies, equipment, materials and commodities for all departments, officers, and employees of the County, to include the County School Board and the Board of Public Welfare or Social Services;

NOW, THEREFORE, BE IT ORDAINED by the York County Board of Supervisors this ____ day of _____, 2000, that the centralized procurement policy for all goods and services for the County of York, as adopted July 19, 1997, be and it is hereby amended to read and provide as follows:

ARTICLE I. PURPOSE, DEFINITIONS, APPLICATION OF POLICY

1-1. Purpose.

The purpose of this policy is to increase public confidence in purchasing by York County, to provide for fair and equitable treatment of all persons involved in public purchasing by the County, to maximize the purchasing value of public funds, to foster competition in the procurement process to the maximum feasible extent, and to provide for a centralized purchasing system of quality and integrity for the County.

1-2. Effective Date.

This policy shall be in effect on and after ~~July 1, 1997~~ October 1, 2000.

1-3. Authority.

This policy is adopted pursuant to §§ 11-35(D) and 15.1-127 of the Code of Virginia and is intended to supersede the operation of the Virginia Public Procurement Act as it applies to the procurement actions of the departments, agencies, officers, and employees subject to this policy. Those sections set forth in § 11-35(E) of the Code of Virginia which, by law apply to all counties, are incorporated herein or are listed in an appendix to this policy for convenience. No other provisions of the Virginia Public Procurement Act shall apply unless specifically incorporated in this policy.

1-4. Definitions.

For purposes of this policy the following words and phrases shall have the meanings set forth below:

- (a) Approving Authority - "Approving Authority" shall mean the Board of Supervisors or the County School Board or the York-Poquoson Social Services Board.
- (b) Board or Board of Supervisors - "Board" or "Board of Supervisors" shall mean the Board of Supervisors of York County, Virginia.
- (c) Competitive Negotiation - Competitive negotiation is a method of procurement, which consists of the following elements:
 - 1. Issuance of a written request for proposal indicating in general terms what is sought to be procured and containing or incorporating by reference the other applicable contractual terms and conditions including any unique capabilities or qualifications which will be required of the offeror.
 - 2. Public notice of the request for proposal at least ten (10) calendar days prior to the date set for receipt of proposals by posting at the entrance to the Division of Purchasing for York County and by publication in at least one newspaper of general circulation in York County. In addition, proposals may be solicited directly from potential offerors.
 - 3. On the basis of the evaluation factors established by this policy and by the request for proposal, at least three (3) offerors deemed to be the most qualified, responsible and suitable on the basis of initial responses shall be selected. (If less than three (3) proposals are received, then less than three (3) offerors may be so selected.) Individual discussions shall then be had with each such offeror.

Review of the proposals submitted and discussions with offerors shall be conducted by a panel established by the using agency of not less than three County representatives that shall include one representative of the Purchasing Division designated by the Purchasing Agent.

Repetitive informal interviews shall be permissible. Offerors shall be encouraged to elaborate on their qualifications, scope of work, performance data, or expertise pertinent to the proposed project as well as any alternative con-

cepts. These discussions may encompass non-binding estimates of total project costs, including, where appropriate, design, construction, and life cycle costs. Methods to be used in arriving at a price for services may also be discussed. Proprietary information from competing offerors shall not be disclosed to the public or to competitors. Price of service may be discussed and considered but will not be the sole determining factor in concluding negotiations.

After negotiations have been conducted with each offeror so selected, the offeror shall be selected which in the opinion of the panel has made the best proposal and the contract shall be offered to that offeror. Should the panel, after the initial submission of proposals, determine in writing that only one offeror is fully qualified, or that one offeror is clearly more qualified than the others under consideration, a contract may be negotiated and awarded to that offeror without further delay. A copy of such written determination shall be provided to the Purchasing Agent and to the approving authority when approval by other than the Purchasing Agent is required.

When the terms and conditions of multiple awards are so provided for in the request for proposal, awards may be made to more than one offeror.

(Note that the procedure for competitive negotiation for the procurement of professional services over ~~\$20,000~~ \$30,000 differs from the one defined here. See Section 2-3(f) of this Policy.)

- (d) Competitive Sealed Bidding - Competitive sealed bidding is a method of procurement which includes the following elements:
1. Issuance of a written invitation to bid containing or incorporating by reference specifications and contractual terms and conditions applicable to the procurement. When it is impractical to prepare initially a purchase description to support an award based on price, an invitation to bid may be issued requesting submission of unpriced offers to be followed by an invitation to bid limited to those bidders whose offers have been qualified under the criteria set forth in the first solicitation.
 2. Public notice of the invitation to bid at least ten (10) calendar days prior to the date set for receipt of bids by posting at the entrance to the Division of Purchasing for York County and by publication in at least one newspaper of general circulation in York County. In addition, bids may be solicited directly from potential offerors.
 3. Public opening and announcement of all bids received.
 4. Evaluation of the bids based on requirements set forth in the invitation and the provisions of this policy.
 5. Award to the lowest responsive and responsible bidder. When the terms and conditions of multiple bids are so provided for in the invitation to bid, awards may be made to more than one bidder. In the event only one bid is received

and the Purchasing Agent in consultation with the using agency makes a determination that it would not be in the best interest of the County to re-bid the procurement, such determination shall be in writing and shall be provided to the approving authority when approval by other than the Purchasing Agent is required.

- (e) Construction - "Construction" shall mean building, altering, repairing, improving or demolishing any structure, building, or roadway, and any draining, dredging, excavation, grading or similar work upon real property.
- (f) County - "County" shall mean the County of York, Virginia, a political subdivision of the Commonwealth of Virginia, and shall include all other departments, public bodies corporate, agencies, sanitary districts and officers of the County to which this policy applies. It shall also include any other entity that has chosen to participate in this policy and has entered into a cooperative procurement agreement with the County.
- (g) County Administrator - "County Administrator" shall mean the County Administrator of York County, or, a duly authorized designee.
- (h) Goods - "Goods" shall mean all material, equipment, supplies, printing, and automated data processing hardware and software.
- (I) Offeror - "Offeror" unless expressly indicated otherwise, shall mean both a bidder, i.e., a person who submits a competitive sealed bid in response to an Invitation to Bid, or a person who submits a proposal in response to a Request for Proposals.
- (j) Purchasing Agent - "Purchasing Agent" shall mean the County Administrator of York County, Virginia, or any person designated by the County Administrator to implement all or a portion of this policy.
- (k) Services - "Services" shall mean any work performed by an independent contractor wherein the service rendered does not consist primarily of the acquisition of equipment or materials or the rental of equipment, materials, or supplies.
- (l) Using Agency - "Using Agency" shall mean any officer, employee, or other entity of the County requiring any goods, services, insurance, or construction to be procured under the policies and procedures established by this policy.

1-5. Application of Policy.

- (a) This policy is intended to provide for centralized competitive purchasing and covers all purchasing by all departments, officers, elements and employees of the County, including specifically, but not limited to, the York County School Board, the York-Poquoson Department of Social Services, Constitutional Officers, and the York County Library. This policy is not intended to require review or approval by the Board of specific items procured by the York County School Board, the York-Poquoson Department of Social Services, the Constitutional Officers, the York County Library, or public bodies who have by agreement become subject to this pol-

icy, when sufficient funds have been appropriated to such entity or officer for the purpose of the procurement and this policy has been followed. The Purchasing Agent with regard to such entities and officers shall, however, by signing all purchase orders for such procurements prior to the placement of a firm order, certify compliance with this policy and procedures issued pursuant to it. The Purchasing Agent shall not execute a purchase order if such procurement has not been in compliance with this policy and the procedures developed pursuant to it.

- (b) This policy shall apply to all purchases or contracts for the purpose of procuring goods, services, insurance, and construction involving the expenditure of public funds.
- (c) When any procurement involves the expenditure of state or federal assistance, grant, loan, or contract funds the procurement shall be conducted in accordance with any mandatory federal or state requirements which are not reflected in this policy if the receipt of such funds is conditioned upon compliance with the mandatory procedures.
- (d) This policy shall not prohibit compliance with the terms and conditions of any grant, gift, or bequest that are otherwise consistent with law.
- (e) This policy shall not apply to contracts existing on its effective date and such contracts may be performed or extended according to their terms.

1-6. Cooperative Procurement.

The Purchasing Agent may administer cooperative procurement agreements with public bodies not otherwise covered by this policy, subject to the terms and conditions of such agreement as may be authorized by the Board.

1-7. Contracts or Purchases Made in Violation of this Policy.

Except as provided herein, no official, elected or appointed, nor any employee, shall purchase or contract for any goods, services, insurance, or construction. Any purchase or contract made contrary to the provisions of this policy shall be void, and the County will not be bound thereby. Any person who makes such a procurement or disposition may be personally liable therefor to the vendor or purchaser of the goods, services, or construction involved.

ARTICLE II. PURCHASING AGENT; COMPETITION REQUIREMENTS

2-1. Delegation of Authority to Purchasing Agent.

The Purchasing Agent shall serve as the principal public purchasing official for the County and shall be responsible, under the supervision of the Board, for the procurement of all goods, services, insurance, and construction as well as the management and disposal of surplus materials. The Purchasing Agent may delegate authority to a duly authorized agent or agents. The authority of the Purchasing Agent shall specifically, but without limitation, include the authority to select the method of procurement to be

used and the authority to negotiate and execute contracts on behalf of the County for any and all procurements or for the disposition of materials. The Purchasing Agent shall conduct all purchasing activities in accordance with the provisions of this policy. The Purchasing Agent may not delegate approval of the use of competitive negotiation, as required by Subparagraph (g) of Section 2-3 of this policy, except in the case of purchases not exceeding ~~\$1,500~~ \$5,000.

2-2. Adoption of Procedures.

The Purchasing Agent shall prepare forms and administrative regulations for the purpose of implementing the provisions of this policy. Such forms and regulations shall be deemed a part of this policy and shall direct the actions of those to whom this policy applies. A copy of such forms and administrative regulations shall be provided to the Board annually, along with a summary of any administrative changes made during the preceding year. The Board shall approve the promulgation of those regulations required by § 15.1-117(12), Code of Virginia, to be approved by the Board.

2-3. Competition Requirements.

Prior to any purchase of goods, insurance, services or construction, reasonable price competition is desired. Except as otherwise provided in this policy the competitive pricing methods set forth below shall be followed:

- (a) For purchases in the amount of ~~\$500~~ \$1,000 or less, prices are to be compared by telephone, catalogue, or by other appropriate means. No permanent documentation of price comparison is required.
- (b) For purchases in excess of ~~\$500~~ \$1,000 and not greater than ~~\$3,500~~ \$5,000, telephone calls shall be placed to at least two suppliers of the item. At a minimum, oral quotes shall be obtained and written documentation of the telephone solicitation shall be made, showing the item requested, date, time, company name, price quoted, and individual making quote. Written requests for quotation may also be used.
- (c) For purchases in excess of ~~\$3,500~~ \$5,000 but not greater than \$30,000 written quotes are required and, at least three (3) suppliers shall be contacted. Telephone or written requests for quotations may be used.
- (d) When a procurement transaction is made under (a), (b), or (c) above, the purchase shall be made from the supplier quoting the lowest price, unless the Purchasing Agent, using the evaluation factors in this policy for competitive negotiation or competitive sealed bidding as the case may be, documents in writing a determination that, in the best interest of the County, such purchase should be made from another supplier quoting a higher price. Such determination for purchases in excess of ~~\$2,500~~ \$5,000 shall be approved by the County Administrator or the approving authority's designee.
- (e) Purchases that in the aggregate or in the sum of all phases are expected to be in excess of \$30,000 shall be made by either competitive sealed bidding or competitive negotiation.
- (f) Purchases of professional services, as that term is defined in § 11-37 of the Code of

Virginia, when the cost of such services is expected to exceed ~~\$20,000~~ \$30,000, shall be made in accordance with subparagraph 3.a. under the definition of competitive negotiation as set forth in § 11-37 of the Code of Virginia.

- (g) The Purchasing Agent shall have the authority to use competitive negotiation to procure any goods, services or insurance, after documenting in advance the basis therefore in writing, as required by § 11-41.C., Code of Virginia. Insurance may be procured through a licensed agent or broker selected in the manner provided for the procurement of things other than professional services in subdivision 3(b) of the definition of "competitive negotiation" in § 11-37, Code of Virginia, if the basis for doing so is approved by the Board. Construction may be procured only by competitive sealed bidding, except that competitive negotiation may be used in the following instances upon a determination made in advance by the Purchasing Agent in writing, after making the findings required by § 11-41.C.2., Code of Virginia:
 - (I) contracts for the alteration, repair, renovation or demolition of buildings when the cost of the contract will not exceed \$500,000; or
 - (ii) contracts for the construction of highways and any draining, dredging, excavation, grading or similar work upon real property.

Nothing in this policy shall prevent the use of competitive sealed bidding or competitive negotiation in procurements under \$30,000, if deemed appropriate by the Purchasing Agent.

2-4. Exceptions to Competition Requirements.

Section 2-3 of this policy shall not apply and no price competition other than specified in this section is required in the following procurement transactions:

- (a) The purchase of items under procurement contracts made available to the County by the Commonwealth of Virginia or to purchases made available to the County through other state, federal, or local governmental entities;
- (b) Contracts for legal services, expert witnesses, and other services associated with litigation, regulatory proceedings, or other legal matters;
- (c) Purchases for special police work when the Sheriff certifies that the purchases are needed for undercover law enforcement operations;
- (d) Contracts and purchases by the Industrial Development Authority with respect to any item of cost of an "authority facility" or "facilities" as defined in § 15.1-1374(d) and (e) of the Code of Virginia;
- (e) Upon a determination by the Purchasing Agent in writing, which writing shall state the basis for such determination, that there is only one source practicably available for that which is to be procured, a contract may be negotiated and awarded to that source without competition. The Purchasing Agent shall conduct appropriate negotiations as to price, delivery, and terms. A record of the sole source procurement shall be main-

tained listing the contractor's name, the amount, and qualifying circumstances. The Purchasing Agent shall provide a copy of the written determination to the County Administrator or other appropriate Approving Authority when approval is required by Section 3-17 of this policy.

- (f) In cases of emergency provided, however, such procurement shall be made with such competition as is practicable under the circumstances. A written statement by the Purchasing Agent of the basis for the emergency and for the selection of the particular supplier shall be included in the papers relating to the procurement. The Purchasing Agent shall develop appropriate procedures regarding emergency purchases. The term "emergency" as used in this subparagraph means a situation where there exists a threat to public health, welfare, or safety or when an unforeseen circumstance causes disruption of an essential service.
- (g) Agreements or contracts entered into between the County and private parties for cost participation or cost sharing in the extension or construction of public utilities or the provision of other public services. Any such agreements must be approved by the Board.
- (h) Travel advances, travel reimbursements, or travel expenses;
- (i) Meals, beverages, entertainment, awards, or similar purchases in conjunction with official county functions or meetings.
- (j) Payments for services to jurors, board and commission members, sports officials, and medical examiners;
- (k) Contracts for local telephone service (excepting cellular and paging services), ~~electric service~~, or other regulated utility services;
- (l) Interdepartmental or interagency expenses or purchases;
- (m) Contracts of employment;
- (n) Advertising and legal notices;
- (o) Dues and subscriptions;
- (p) Employee educational expenses;
- (q) Textbooks, library books, and other library items for circulation to, or use by students, acquired by the public schools;
- (r) Public library books and other library items for circulation to, or use by the public;
- (s) Services rendered to or payments received by clients of the Department of Social Services;

- (t) Foster home placements;
- (u) Treatment services provided to clients by the Department of Community Services;
- (v) Clinical supervision services for counselors in County employment;
- (w) Occupational therapy, physical therapy, student evaluations;
- (x) Mail and mail-related costs (e.g. postage meter expense, stamps, etc.);
- (y) Instructional/specialty educational materials, promotional items, Crafts.

2-5. Purchases at Auction.

Notwithstanding any other provision of this policy, upon a determination by the Purchasing Agent that the purchase of certain designated goods from a public auction sale is in the best interest of the County, such items may be purchased at auction sale. The Purchasing Agent shall document the basis for any such determination.

2-6. Documentation Required.

Documentation of competitive pricing or other documentation required by this policy, including a complete copy of the solicitation for competitive bids or proposals, shall be retained along with other papers related to the procurement in the office of the Division of Purchasing. Such documentation shall be retained until the acquisition of goods is completed or the services have been rendered and after such time may be destroyed in accordance with County and State procedures governing records retention.

ARTICLE III. ADMINISTRATIVE PROVISIONS

3-1. Division of Requirements.

No using agency shall artificially divide contract requirements so as to avoid any dollar limitations set forth in this policy.

3-2. Bid List.

The County does not accept the responsibility for maintaining a bid list or the responsibility for the failure of any competitor to receive a solicitation directly from the County. The Purchasing Agent, may for the convenience of the County, maintains a bidders list containing the names of prospective offerors. The maintenance of such list shall not be construed as the acceptance of an obligation to notify any or all of the prospective offerors on such list of procurement transactions by the County.

3-3. Cost Plus Percentage of Cost Contracts Prohibited.

Except in the case of an emergency affecting the public health, safety or welfare, no contract shall be awarded on the basis of cost plus a percentage of cost. This paragraph shall not apply to contracts of

insurance. Public contracts may be awarded on any other basis.

3-4. Modification of Contracts.

Contracts entered into by the County may include provisions for modification of the contract during performance but no fixed price contract may be increased by more than 10 percent of the amount of the contract or ~~\$10,000~~ \$20,000, whichever is greater, without prior approval by the Board or other approving authority. The time of performance for any contract shall not be extended by more than ~~45~~ 20 percent of the original term of the contract or ~~fifteen (15)~~ thirty (30) days, whichever is greater, without prior approval by the Board or other Approving Authority. Any such modifications shall not exceed appropriations available for the project. In no event may the amount of any contract, without adequate consideration, be increased for any purpose, including, but not limited to, relief of an offeror from the consequences of an error in its bid or offer.

3-5. Prequalification of Offerors.

The Purchasing Agent may pre-qualify prospective offerors for any solicitation. Consideration of bids or proposals may be limited to pre-qualified offerors. The opportunity to pre-qualify shall be given to any prospective offeror who has not been suspended or debarred under this policy.

- (a) Pre-qualification of prospective contractors for construction. If the Purchasing Agent chooses to pre-qualify prospective contractors for construction, an application form shall be used which sets forth the criteria upon which the qualifications of prospective contractors will be evaluated. The application form shall request of prospective contractors only such information and documents as are appropriate for an objective evaluation of all prospective contractors pursuant to such criteria.

The form shall contain a box, which the prospective contractor may check to request that all information submitted by the contractor in connection with the pre-qualification process shall be deemed a trade secret or proprietary information pursuant to subdivision B 55 of § 2.1-342, Code of Virginia. In all instances in which the Purchasing Agent requires pre-qualification of potential contractors for construction projects, advance notice shall be given of the deadline for the submission of pre-qualification applications. The deadline for submission shall be sufficiently in advance of the date set for the submission of bids for such construction so as to allow the procedures set forth in this section to be accomplished. At least thirty (30) days prior to the date established for submission of bids or proposals under the procurement of the contract for which the pre-qualification applies, the Purchasing Agent shall advise in writing each contractor which submitted an application whether that contractor has been pre-qualified. In the event that a contractor is denied pre-qualification, the written notification to such contractor shall state the reasons for such denial of pre-qualification and the factual basis of such reasons. The Purchasing Agent may deny pre-qualification to any contractor only if the Agent finds one of the following:

- (1) The contractor does not have sufficient financial ability to perform the contract that would result from such procurement. If a bond is required to ensure performance of a contract, evidence that the contractor can acquire a surety bond from a corporation included on the United States Treasury list of ac-

ceptable surety corporations in the amount and type required by the public body shall be sufficient to establish the financial ability of such contractor to perform the contract resulting from such procurement;

- (2) The contractor does not have appropriate experience to perform the construction project in question;
- (3) The contractor has had judgments entered against him for the breach of contracts for construction;
- (4) The contractor has been in substantial noncompliance with the terms and conditions of prior construction contracts with the County without good cause. If the County has not contracted with a contractor in any prior construction contracts, the Purchasing Agent may deny prequalification if the contractor has been in substantial noncompliance with the terms and conditions of comparable construction contracts with another locality without good cause. In all instances, any such substantial noncompliance shall be documented;
- (5) The contractor has been convicted within the past five years of a felony involving moral turpitude regarding any procurement of or performance of a construction contract;
- (6) The contractor failed to provide to the Purchasing Agent in a timely manner any information requested relevant to subdivisions 1 through 5 above.

(b) Pre-qualification for prospective offerors for other than construction solicitations.

If the Purchasing Agent chooses to prequalify prospective offerors for procurements for other than construction, the procedure set forth in subsection (a) above shall be followed, except that reasonable notice in writing of less than thirty (30) days prior to the date established for the submission of bids or proposals may be given to prospective offerors as to whether they are deemed pre-qualified or not. The Purchasing Agent may include in the application form for the pre-qualification of prospective offerors of this type reasonable criteria in addition to those set forth in subsection (a) above for the pre-qualification evaluation.

(c) Pre-qualification generally.

In pre-qualifying offerors pursuant to either (a) or (b) above:

- (1) Pre-qualification of a prospective offeror shall not constitute a conclusive determination that a offeror is responsible, and such offeror may be rejected as not responsible on the basis of subsequently discovered information.
- (2) The failure of a prospective offeror to pre-qualify with respect to a given procurement shall not bar the offeror from seeking pre-qualification as to future procurements or from bidding or submitting proposals on procurements which do not require pre-qualification.

A decision by the Purchasing Agent denying pre-qualification shall be final and conclusive unless the offeror appeals the decision by instituting legal action pursuant to § 11-70, Code of Virginia.

3-6. Pre-Bid Conferences.

When deemed necessary by the Purchasing Agent, a pre-bid conference with prospective bidders may be held after draft specifications have been prepared. Such conferences are for the purpose of detecting unclear provisions and tend to widen competition by removing unnecessarily restrictive language. After such conference the final specifications shall be prepared.

3-7. Comments or Questions Regarding Invitations for Bid or Requests for Proposal.

Once invitations to bid or requests for proposal have been advertised, should a prospective offeror find any discrepancy in, or omissions from, the specifications, request for proposal, or other contract documents, or should he be in doubt as to their meaning, he shall at once notify the specified contact person who will send written instructions to all bidders. The County will not be responsible for any oral instructions.

3-8. Bonds.

In addition to any bonds which may be required by state law, the Purchasing Agent may, in the Agent's sole discretion, require a bid, performance, or payment bond or other specified surety arrangement in any procurement solicitation, provided that for construction contracts in excess of \$100,000, performance and payment bonds shall be required in the amount of the contract. The requirement for such surety shall be clearly stated in the solicitation.

3-9. Offeror's Responsibilities.

By submitting a bid or proposal an offeror agrees and warrants that it has examined all contract documents and, if appropriate, the subject of the contract, and where the specifications require a given result to be produced, that the specifications are adequate and the required results can be produced under the specifications in the contract. Omissions from the specifications shall not relieve the offeror from the responsibility of complying with the general terms and intent of the contract as indicated by the specifications. Once the award has been made, failure to have read all the conditions, instructions, and specifications of the contract will not be cause to alter the original contract or proposal, or for the offeror to request additional compensation.

3-10. Signatures on Offers or Bids.

The firm, corporation, or individual name of the offeror must be signed to any proposals or bids submitted. In the case of a corporation, the title of the officer signing must be stated and each officer must be duly authorized. In the case of a partnership, the signature of at least one of the partners must follow the firm name using the term "member of the firm" or "general partner".

3-11. Withdrawal or Cancellation of Bids.

Except as provided in the second paragraph of this section, an offeror may withdraw or cancel a bid or proposal at any time prior to the date set for opening. After such time the offeror or bidder may not withdraw for a period of sixty (60) calendar days. Any offeror may be required to clarify its offer or bid or acknowledge by written confirmation that the minimum requirements of the specifications are included in the offeror's proposal.

The withdrawal of bids for construction contracts shall be handled in the manner specified in the advertisement for bids in accordance with the provisions of § 11-54.A. of the Code of Virginia.

3-12. Evaluation of Sealed Bids.

When competitive sealed bidding is used, the following factors shall be considered, in addition to price, when determining the lowest responsible bidder and the responsiveness of the bid:

- (a) The ability, capacity, and skill of the bidder to perform the contract or provide the service required.
- (b) Whether the bidder can perform the contract or provide the service promptly, or within the time specified, without delay or interference.
- (c) The character, integrity, reputation, judgment, experience, and efficiency of the bidder.
- (d) The quality of performance of previous contracts or services.
- (e) The previous and existing compliance by the bidder with laws and ordinances relating to the contract or service.
- (f) The sufficiency of financial resources and ability of the bidder to perform the contract or provide the service.
- (g) The quality, availability and adaptability of the goods or services to the particular use required.
- (h) The ability of the bidder to perform future maintenance and service for use of the subject of the contract.
- (i) The number and scope of conditions attached to the bid.
- (j) Any other condition or criteria included in the request for bids or the instructions to bidders.

3-13. Evaluation of Proposals Under Competitive Negotiation.

When competitive negotiation is the method of procurement selected, the following factors shall be considered in a descending order of importance in determining the most qualified firm or individual:

- (a) Any special qualifications or requirements set forth in the proposal documents.

- (b) Qualifications of the project manager and project teams.
- (c) Overall qualifications and experience of the firm and any subcontractors to be used.
- (d) Quality of the content of the proposal and its responsiveness to the request for proposal.
- (e) The sufficiency of financial resources and ability of the bidder to perform the contract or provide the services.
- (f) Financial ability of the firm to perform future maintenance and service for the subject of the contract.
- (g) The location of the office that will have the responsibility for providing the services and the ability of the offeror to respond quickly to requests and requirements of the County.
- (h) Cost estimates (which may or may not be required at the time of submission of the proposal, depending upon the circumstances).

3-14. Tie Bids.

If more than one bid or proposal received is for the same total amount or unit price, quality and service being equal, the tie bidders shall be invited to resubmit written bids below the original bid and the award shall be made to the bidder with the lowest price.

3-15. Negotiations When Bids Exceed Available Funds.

If the lowest acceptable bid exceeds available funds, the Purchasing Agent may negotiate with the bidder to obtain a contract price within available funds. The negotiations shall be confined to a reduction in the contract price and shall not deal with changes in the contract requirements.

3-16. Cancellation or Rejection of Bids.

An invitation to bid, a request for proposal, any other solicitation, or any and all bids or proposals received may be canceled or rejected when the Purchasing Agent determines that it is in the best interest of the County to do so. The reasons therefor shall be made a part of the contract file. Any bid which is incomplete, conditional, obscure, or which is not in conformance with the specifications may be rejected or any such irregularities may be waived at the option of the Purchasing Agent provided they do not affect the price, quality, quantity, or delivery schedule for the goods, services, or construction to be procured.

No bidder shall be permitted to alter, modify or amend its bid after the time fixed for submission of bids, except as provided in Section 3-11 of this Policy.

No bid received after the time fixed for submission of bids shall be opened or considered.

No statement or notation whatsoever, written, printed, typed or otherwise set out on any bid or offer envelope, including any addition or deduction in contract price, shall be recognized or considered in the review and tabulation of any bid or offer or for any other purpose.

3-17. Approvals.

Except as provided for emergency purchases, all purchases in excess of ~~\$2,500~~ \$3,500 shall be specifically approved by the County Administrator, or the Approving Authority's designee, prior to the placement of a firm order. Purchases in excess of \$30,000 shall be specifically approved by the Board of Supervisors or the appropriate Approving Authority prior to placement of a firm order. Emergency purchases may be approved after the fact. The request for approval shall identify the method of price competition used in the procurement. ~~If, for procurements in excess of \$30,000, the Purchasing Agent, pursuant to Section 2-3(g) of this policy, chooses competitive negotiation as the method of solicitation, and competitive negotiation is not the method of procurement required by state law or this policy, the Board of Supervisors shall be notified prior to the issuance of the request for proposals.~~

This policy is not intended to require review or approval by the Board of specific items procured by the York County School Board, the York-Poquoson Department of Social Services, the Constitutional Officers, the York County Library, or public bodies who have by agreement become subject to this policy, when sufficient funds have been appropriated to such entity or officer for the purpose of the procurement and this policy has been followed. The Purchasing Agent with regard to such entities and officers shall, however, by signing all purchase orders for such procurements prior to the placement of a firm order, certify compliance with this policy and procedures issued pursuant to it. The Purchasing Agent shall not execute a purchase order if such procurement has not been in compliance with this policy and the procedures developed pursuant to it.

3-18. Contract Requirements and Legal Review.

The terms and conditions of procurements in excess of \$15,000 shall be reviewed and approved as to form by the County Attorney prior to issuance by the Purchasing Agent. Contracts signed by all parties and containing, or incorporating by reference, all applicable terms and conditions shall be required for procurements of services or construction in excess of ~~\$15,000~~ \$25,000. Formal Invitations for Bids (IFB) and Requests for Proposals (RFP) for procurement of construction or services, when required, shall be reviewed by the County Attorney prior to advertising. Whenever a contract, signed by all parties and containing, or incorporating by reference, all applicable terms and conditions is to be used in a procurement, it and all amendments and changes thereto shall be approved as to form by the County Attorney.

3-19. Decisions of Purchasing Agent or Board Final.

All offerors are subject to the decision of the Purchasing Agent as to the quality of what is offered, responsiveness of the offer, responsibility of the offeror, and the qualifications of the offeror. The Purchasing Agent will evaluate bids or proposals and in all cases the decision made shall be final. Every offeror submitting a bid or proposal agrees, as a condition precedent to the submission, to abide by the decisions of such official and all of the provisions of this policy.

Following execution of a contract as the result of a competitive negotiation, an unsuccessful offeror

may request a 'de-briefing' of a specific procurement action. Such request shall be submitted in writing to the Purchasing Agent not more than thirty (30) days following the action of the approving authority.

The Purchasing Agent shall meet with the offeror within fifteen (15) days of the request to discuss how the offeror may improve proposals for future work with the County.

3-20. Debarment and Suspension.

After giving fifteen (15) days' written notice and providing an opportunity to be heard, the Purchasing Agent, after consultation with the County Attorney, is authorized to debar any offeror for cause from consideration for the award of contracts. The debarment shall not be for a period of more than three (3) years.

After consultation with the County Attorney, the Purchasing Agent is authorized to suspend an offeror from consideration for the award of contract if there is probable cause to believe that the offeror has engaged in any activity that might lead to debarment. The suspension shall not be for a period exceeding three (3) months. Notice of any debarment or suspension shall be provided to the Board, and to the contractor, stating the reasons for the action taken.

The causes for any such debarment or suspension may include, but are not necessarily limited to, the following:

- (a) Conviction for commission of a criminal offense as an incident to obtaining or attempting to obtain a public or private contract or subcontract or in the performance of such contract or subcontract;
- (b) Conviction under state or federal statutes of embezzlement, theft, forgery, bribery, falsification or destruction of records, receiving stolen property, or any other offense of moral turpitude indicating a lack of business or personal integrity or honesty which currently, seriously, and directly affects responsibility as a County offeror;
- (c) Conviction under state or federal antitrust statutes arising out of the submission of bids or proposals;
- (d) Violation of contract provisions of a character which is regarded by the Purchasing Agent to be so serious as to justify a debarment action including, but not limited to:
 - 1. Deliberate failure without good cause to perform in accordance with the specifications or within the time limit provided in a contract with the County; or
 - 2. A record of failure to perform or of unsatisfactory performance in accordance with the terms of one or more contracts.
- (e) Any other cause the Purchasing Agent determines to be so serious and compelling as to affect responsibility as a County contractor including debarment by another governmental entity.

3-21. Freedom of Information Act.

With the following exceptions, procurement documents are subject to the Virginia Freedom of Information Act:

- (a) Cost estimates relating to a proposed procurement transaction prepared by or for the County shall not be open to public inspection.
- (b) Bid and proposal records shall be open to public inspection only after award of the contract. Any bidder or offeror may be allowed to inspect the bid or proposal records after bid opening or after the evaluation and negotiation of proposals are completed, and prior to award unless the County decides not to accept any bids or not to accept any of the proposals and to reopen the contract.
- (c) Trade secrets or proprietary information submitted to the County are not subject to disclosure if requested by the person submitting such information prior to or upon submission of the data or other materials. Any such request must identify what is to be protected and state the reasons therefor.
- (d) Any inspection of procurement transaction records under this section shall be subject to reasonable restrictions imposed by the Purchasing Agent to insure security and integrity of the records.

3-22. Claims.

Contract claims, if not otherwise provided for in such contract, shall be submitted to the Board in accordance with the provisions of ~~§§15.1-550~~ §§ 15.2-1245, et seq., Code of Virginia, or, if appropriate, to the County School Board pursuant to §§ 22.1-122, and 15.2-1245, et seq., Code of Virginia, mutatis mutandis.

ARTICLE IV. DISPOSITION OF SURPLUS PROPERTY.

4-1. Sale of Surplus Property.

All using agencies shall, upon request, submit to the Purchasing Agent a report of all surplus, worn out, or obsolete items which should be disposed of. The Purchasing Agent shall have the authority to transfer such surplus stock to other using agencies. All property not so transferred shall be exchanged, traded in on new items, salvaged, or sold as deemed appropriate by the Purchasing Agent.

In general, ~~all sales shall~~ may be made at public auction, after ~~a minimum of ten (10) calendar days~~ prior advertisement in a newspaper of general circulation in the County of York, or sold on an appropriate web-site (at the sole discretion of the Purchasing Agent) to the highest bidder. Individual items may be scrapped, if in the opinion of the Purchasing Agent, the cost of storage and sale exceeds the value of the item. If the value of any individual item is estimated to exceed ~~\$5,000~~ \$10,000, sealed bids shall be solicited by public notice inserted at least once in a newspaper of general circulation in York County at least ten (10) calendar days prior to the final date for the submission of sealed bids. Bids may also be solicited for the disposition of any surplus item if the Purchasing Agent determines it

to be in the best interest of the County. The Board, upon the request of the Purchasing Agent, may make a special dispensation of any individual item if, in the opinion of the Board, such dispensation is in the public interest.

APPENDIX

VIRGINIA CODE PROVISIONS APPLICABLE TO COUNTY PROCUREMENT.

The following provisions of the Code of Virginia apply to the purchasing procedures of the County and are incorporated in this policy for the convenience of the user:

§ 11-37 ... "Competitive negotiation" ... 3.a, Procurement of professional services.

The public body shall engage in individual discussions with two or more offerors deemed fully qualified, responsible and suitable on the basis of initial responses and with emphasis on professional competence, to provide the required services. Repetitive interviews shall be permissible. Such offerors shall be encouraged to elaborate on their qualifications and performance data or staff expertise pertinent to the proposed project, as well as alternative concepts. The Request for Proposal shall not, however, request that offerors furnish estimates of man-hours or cost for services. At the discussion stage, the public body may discuss nonbinding estimates of total project costs, including, but not limited to, life-cycle costing, and where appropriate, nonbinding estimates of price for services. Proprietary information from competing offerors shall not be disclosed to the public or to competitors. At the conclusion of discussion, outlined in this subdivision above, on the basis of evaluation factors published in the Request for Proposal and all information developed in the selection process to this point, the public body shall select in the order of preference two or more offerors whose professional qualifications and proposed services are deemed most meritorious. Negotiations shall then be conducted, beginning with the offeror ranked first. If a contract satisfactory and advantageous to the public body can be negotiated at a price considered fair and reasonable, the award shall be made to that offeror. Otherwise, negotiations with the offeror ranked first shall be formally terminated and negotiations conducted with the offeror ranked second, and so on until such a contract can be negotiated at a fair and reasonable price. Should the public body determine in writing and in its sole discretion that only one offeror is fully qualified, or that one offeror is clearly more highly qualified and suitable than the others under consideration, a contract may be negotiated and awarded to that offeror.

A contract for architectural or professional engineering services relating to construction projects may be negotiated by a state agency, as defined in § 11-62.1, for multiple projects provided (i) the projects require similar experience and expertise, (ii) the nature of the projects is clearly identified in the Request for Proposal, and (iii) the contract term is limited to one year or when the cumulative total project fees reach the maximum cost authorized in this paragraph, whichever occurs first. Such contract may be renewable for one additional term at the option of the state agency. Under such contract, (i) the fair and reasonable prices, as negotiated, shall be used in determining the cost of each project performed, (ii) the sum of all projects performed in one contract term shall not exceed \$500,000 or such lesser amount as may be determined by the Director of the Department of General Services, and (iii) the project fee of any single project shall not exceed \$100,000 or such lesser amount as may be determined by the Director of the Department of General Services. Any unused

amounts from the first contract term shall not be carried forward to the additional term. Competitive negotiations for such contracts may result in awards to more than one offeror provided (i) the Request for Proposal so states and (ii) the state agency has established procedures for distributing multiple projects among the selected contractors during the contract term.

Multiphase professional services contracts satisfactory and advantageous to the Department of Transportation for environmental, location, design and inspection work regarding highways and bridges may be negotiated and awarded based on a fair and reasonable price for the first phase only, when completion of the earlier phases is necessary to provide information critical to the negotiation of a fair and reasonable price for succeeding phases.

§ 11-41.1. Competitive bidding on state-aid projects.

No contract for the construction of any building or for an addition to or improvement of an existing building by any local government or subdivision of local government for which state funds of \$30,000 or more, either by appropriation, grant-in-aid or loan, are used or are to be used for all or part of the cost of construction shall be let except after competitive sealed bidding or after competitive negotiation as provided under subdivision 2 of subsection C of §11-41. The procedure for the advertising for bids or for proposals and for letting of the contract shall conform, mutatis mutandis, to this chapter.

§ 11-49. Use of brand names.

Unless otherwise provided in the Invitation to Bid, the name of a certain brand, make or manufacturer does not restrict bidders to the specific brand, make or manufacturer named; it conveys the general style, type, character, and quality of the article desired, and any article which the public body in its sole discretion determines to be the equal of that specified, considering quality, workmanship, economy of operation, and suitability for the purpose intended, shall be accepted.

§ 11-51. Employment discrimination by contractor prohibited.

All public bodies shall include in every contract of over \$10,000 the provisions in 1 and 2 herein:

1. During the performance of this contract, the contractor agrees as follows:

a. The contractor will not discriminate against any employee or applicant for employment because of race, religion, color, sex or national origin, age, disability, or any other basis prohibited by state law relating to discrimination in employment, except where ~~there~~ religion, sex or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of the contractor. The contractor agrees to post in conspicuous places, available to employees and applicants for employment, notices setting forth the provisions of this nondiscrimination clause.

b. The contractor, in all solicitations or advertisements for employees placed by or on behalf of the contractor, will state that such contractor is an equal opportunity employer.

c. Notices, advertisements and solicitations placed in accordance with federal law, rule or regulation shall be deemed sufficient for the purpose of meeting the requirements of this section.

2. The contractor will include the provisions of the foregoing paragraphs a, b and c in every sub-contract or purchase order of over \$10,000, so that the provisions will be binding upon each subcontractor or vendor.

§ 11-54. Withdrawal of bid due to error.

A. A bidder for a public construction contract, other than a contract for construction or maintenance of public highways, may withdraw his bid from consideration if the price bid was substantially lower than the other bids due solely to a mistake therein, provided the bid was submitted in good faith, and the mistake was a clerical mistake as opposed to a judgment mistake, and was actually due to an unintentional arithmetic error or an unintentional omission of a quantity of work, labor or material made directly in the compilation of a bid, which unintentional arithmetic error or unintentional omission can be clearly shown by objective evidence drawn from inspection of original work papers, documents and materials used in the preparation of the bid sought to be withdrawn. One of the following procedures for withdrawal of a bid shall be selected by the public body and stated in the advertisement for bids: (i) the bidder shall give notice in writing of his claim of right to withdraw his bid within two business days after the conclusion of the bid opening procedure and shall submit original work papers with such notice; or (ii) the bidder shall submit to the public body or designated official his original work papers, documents and materials used in the preparation of the bid within one day after the date fixed for submission of bids. The work papers shall be delivered by the bidder in person or by registered mail at or prior to the time fixed for the opening of bids. In either instance, such work papers, documents and materials may be considered as trade secrets or proprietary information subject to the conditions of subsection D of § 11-52. The bids shall be opened one day following the time fixed by the public body for the submission of bids. Thereafter, the bidder shall have two hours after the opening of bids within which to claim in writing any mistake as defined herein and withdraw his bid. The contract shall not be awarded by the public body until the two-hour period has elapsed. Such mistake shall be proved only from the original work papers, documents and materials delivered as required herein.

B. A public body may establish procedures for the withdrawal of bids for other than construction contracts.

C. No bid may be withdrawn under this section when the result would be the awarding of the contract on another bid of the same bidder or of another bidder in which the ownership of the withdrawing bidder is more than five percent.

D. If a bid is withdrawn under the authority of this section, the lowest remaining bid shall be deemed to be the low bid.

E. No bidder who is permitted to withdraw a bid shall, for compensation, supply any material or labor to or perform any subcontract or other work agreement for the person or firm to whom the contract is awarded or otherwise benefit, directly or indirectly, from the performance of the project for which the withdrawn bid was submitted.

F. If the public body denies the withdrawal of a bid under the provisions of this section, it shall notify the bidder in writing stating the reasons for its decision and award the contract to such bidder at the bid price, provided such bidder is a responsible and responsive bidder.

§ 11-56. Retainage on construction contracts.

A. In any public contract for construction which provides for progress payments in installments based upon an estimated percentage of completion, the contractor shall be paid at least ninety-five percent of the earned sum when payment is due, with not more than five percent being retained to assure faithful performance of the contract. All amounts withheld may be included in the final payment.

B. Any subcontract for a public project which provides for similar progress payments shall be subject to the same limitations.

§ 11-56.1 Deposit of certain retained funds with local governments.

Deposit of certain retained funds on certain contracts with local governments; penalty for failure to timely complete.

A. Any county, city, town or agency thereof or other political subdivision of the Commonwealth when contracting directly with contractors for public contracts of \$200,000 or more for construction of highways, roads, streets, bridges, parking lots, demolition, clearing, grading, excavating, paving, pile driving, miscellaneous drainage structures, and the installation of water, gas, sewer lines and pumping stations where portions of the contract price are to be retained, shall include in the Bid Proposal an option for the contractor to use an escrow account procedure for utilization of the political subdivision's retainage funds by so indicating in the space provided in the proposal documents. In the event the contractor elects to use the escrow account procedure, the "Escrow Agreement" form included in the Bid Proposal and Contract shall be executed and submitted to the political subdivision within fifteen calendar days after notification. If the "Escrow Agreement" form is not submitted within the fifteen-day period, the contractor shall forfeit his rights to the use of the escrow account procedure.

B. In order to have retained funds paid to an escrow agent, the contractor, the escrow agent, and the surety shall execute an "Escrow Agreement" form. The contractor's escrow agent shall be a trust company, bank or savings institution with its principal office located in the Commonwealth. The "Escrow Agreement" and all regulations promulgated by the political subdivision entering into the contract shall be substantially the same as that used by the Commonwealth of Virginia Department of Transportation.

C. This section shall not apply to public contracts for construction for railroads, public transit systems, runways, dams, foundations, installation or maintenance of power systems for the generation and primary and secondary distribution of electric current ahead of the customer's meter, the installation or maintenance of telephone, telegraph or signal systems for public utilities and the construction or maintenance of solid waste or recycling facilities and treatment plants.

D. Any such public contract for construction with a county, city, town or agency thereof or other political subdivision of the Commonwealth, which includes payment of interest on retained funds, may require a provision whereby the contractor, exclusive, of reasonable circumstances beyond the control of the contractor stated in the contract, shall pay a specified penalty for each day exceeding the completion date stated in the contract.

E. Any subcontract for such public project which provides for similar progress payment shall be subject to the provisions of this section.

§ 11-56.2. Barring damages for unreasonable delays declared void.

Public construction contract provisions barring damages for unreasonable delays declared void.

A. Any provisions contained in any public construction contract entered into on or after July 1, 1991, that purports to waive, release, or extinguish the rights of a contractor to recover costs or damages for unreasonable delay, in performing such contract, either on his behalf or on behalf of his subcontractor if and to the extent such delay is caused by acts or omissions of the public body, its agents or employees and due to causes within their control is against public policy and is void and unenforceable.

B. Subsection A shall not be construed to render void any provision of a public construction contract that:

1. Allows a public body to recover that portion of delay costs caused by the acts or omissions of the contractor, or its subcontractors, agents or employees;
2. Requires notice of any delay by the party claiming the delay;
3. Provides for liquidated damages for delay; or
4. Provides for arbitration or any other procedure designed to settle contract disputes.

C. A contractor making a claim against a public body for costs or damages due to the alleged delaying of the contractor in the performance of its work under any public construction contract shall be liable to the public body and shall pay it for a percentage of all costs incurred by the public body in investigating, analyzing, negotiating, litigating and arbitrating the claim, which percentage shall be equal to the percentage of the contractor's total delay claim which is determined through litigation or arbitration to be false or to have no basis in law or in fact.

§ 11-57. Bid bonds.

A. Except in cases of emergency, all bids or proposals for construction contracts in excess of \$100,000 shall be accompanied by a bid bond from a surety company selected by the bidder which is legally authorized to do business in Virginia, as a guarantee that if the contract is awarded to such bidder, that bidder will enter into the contract for the work mentioned in the bid. The amount of the bid bond shall not exceed five percent of the amount bid.

B. No forfeiture under a bid bond shall exceed the lesser of (i) the difference between the bid for which the bond was written and the next low bid, or (ii) the face amount of the bid bond.

C. Nothing in this section shall preclude a public body from requiring bid bonds to accompany bids or proposals for construction contracts anticipated to be less than \$100,000.

§ 11-58. Performance and payment bonds.

A. Upon the award of any public construction contract exceeding \$100,000 awarded to any prime contractor, such contractor shall furnish to the public body the following bonds:

1. A performance bond in the sum of the contract amount conditioned upon the faithful performance of the contract in strict conformity with the plans, specifications and conditions of the contract.

2. A payment bond in the sum of the contract amount. Such bond shall be for the protection of claimants who have and fulfill contracts to supply labor or materials to the prime contractor to whom the contract was awarded, or to any subcontractors, in the prosecution of the work provided for in such contract, and shall be conditioned upon the prompt payment for all such material furnished or labor supplied or performed in the prosecution of the work. "Labor or materials" shall include public utility services and reasonable rentals of equipment, but only for periods when the equipment rented is actually used at the site.

B. Each of such bonds shall be executed by one or more surety companies selected by the contractor which are legally authorized to do business in Virginia.

C. If the public body is the Commonwealth of Virginia, or any agency or institution thereof, such bonds shall be payable to the Commonwealth of Virginia, naming also the agency or institution thereof. Bonds required for the contracts of other public bodies shall be payable to such public body.

D. Each of the bonds shall be filed with the public body which awarded the contract, or a designated office or official thereof.

E. Nothing in this section shall preclude a public body from requiring payment or performance bonds for construction contracts below \$100,000.

F. Nothing in this section shall preclude such contractor from requiring each subcontractor to furnish a payment bond with surety thereon in the sum of the full amount of the contract with such subcontractor conditioned upon the payment to all persons who have and fulfill contracts which are directly with the subcontractor for performing labor and furnishing materials in the prosecution of the work provided for in the subcontract.

§ 11-59. Action on performance bond.

No action against the surety on a performance bond shall be brought unless within five years after completion of the work on the project to the satisfaction of the chief engineer, Department of Transportation, in cases where the public body is the Department of Transportation, or within one year after (i) completion of the contract, including the expiration of all warranties and guarantees, or (ii) discovery of the defect or breach of warranty, if the action be for such, in all other cases.

§ 11-60. Actions on payment bonds.

A. Subject to the provisions of subsection B hereof, any claimant who has performed labor or furnished material in accordance with the contract documents in the prosecution of the work provided in any contract for which a payment bond has been given, and who has not been paid in full therefor

before the expiration of ninety days after the day on which such claimant performed the last of such labor or furnished the last of such materials for which he claims payment, may bring an action on such payment bond to recover any amount due him for such labor or material, and may prosecute such action to final judgment and have execution on the judgment. The obligee named in the bond need not be named a party to such action.

B. Any claimant who has a direct contractual relationship with any subcontractor from whom the contractor has not required a subcontractor payment bond under §11-58(F) but who has no contractual relationship, express or implied, with such contractor, may bring an action on the contractor's payment bond only if he has given written notice to such contractor within 180 days from the day on which the claimant performed the last of the labor or furnished the last of the materials for which he claims payment, stating with substantial accuracy the amount claimed and the name of the person for whom the work was performed or to whom the material was furnished. Any claimant who has a direct contractual relationship with a subcontractor from whom the contractor has required a subcontractor payment bond under §11-58(F) but who has no contractual relationship, express or implied, with such contractor, may bring an action on the subcontractor's payment bond. Notice to the contractor shall be served by registered or certified mail, postage prepaid, in an envelope addressed to such contractor at any place where his office is regularly maintained for the transaction of business. Claims for sums withheld as retainages with respect to labor performed or materials furnished, shall not be subject to the time limitations stated in this subsection.

C. Any action on a payment bond must be brought within one year after the day on which the person bringing such action last performed labor or last furnished or supplied materials.

§ 11-61. Alternative forms of security.

A. In lieu of a bid, payment, or performance bond, a bidder may furnish a certified check or cash escrow in the face amount required for the bond.

B. If approved by the Attorney General in the case of state agencies, or the attorney for the political subdivision in the case of political subdivisions, a bidder may furnish a personal bond, property bond, or bank or savings and loan association's letter of credit on certain designated funds in the face amount required for the bid. Approval shall be granted only upon a determination that the alternative form of security proffered affords protection to the public body equivalent to a corporate surety's bond.

C. The provisions of subsections A and B shall not apply to the Department of Transportation.

§ 11-72. Purpose.

The provisions of this article supplement, but do not supersede, other provisions of law including, but not limited to, the State and Local Government Conflict of Interests Act (§ 2.1-639.1 et seq.), the Virginia Governmental Frauds Act (§ 18.2-498.1 et seq.) and Articles 2 (§ 18.2-438 et seq.) and 3 (§18.2-446 et seq.) of Chapter 10 of Title 18.2. The provisions of this article apply notwithstanding the fact that the conduct described may not constitute a violation of the State and Local Government Conflict of Interests Act.

§ 11-73. Definitions.

The words defined in this section shall have the meanings set forth below throughout this article.

"Immediate family" shall mean a spouse, children, parents, brothers and sisters, and any other person living in the same household as the employee.

"Official responsibility" shall mean administrative or operating authority, whether intermediate or final, to initiate, approve, disapprove or otherwise affect a procurement transaction, or any claim resulting therefrom.

"Pecuniary interest arising from the procurement" shall mean a personal interest in a contract as defined in the State and Local Government Conflict of Interests Act (§ 2.1-639.1 et seq.).

"Procurement transaction" shall mean all functions that pertain to the obtaining of any goods, services or construction, including description of requirements, selection and solicitation of sources, preparation and award of contract, and all phases of contract administration.

"Public employee" shall mean any person employed by a public body, including elected officials or appointed members of governing bodies.

§ 11-74. Proscribed Participation by employees in procurement transactions.

Except as may be specifically allowed by subdivisions A 2 and A 3 of § 2.1-639.11, no public employee having official responsibility for a procurement transaction shall participate in that transaction on behalf of the public body when the employee knows that:

1. The employee is contemporaneously employed by a bidder, offeror or contractor involved in the procurement transaction; or
2. The employee, the employee's partner, or any member of the employee's immediate family holds a position with a bidder, offeror or contractor such as an officer, director, trustee, partner or the like, or is employed in a capacity involving personal and substantial participation in the procurement transaction, or owns or controls an interest of more than five percent; or
3. The employee, the employee's partner, or any member of the employee's immediate family has a pecuniary interest arising from the procurement transaction; or
4. The employee, the employee's partner, or any member of the employee's immediate family is negotiating, or has an arrangement concerning, prospective employment with a bidder, offeror or contractor.

§ 11-75. Solicitation or acceptance of gifts.

No public employee having official responsibility for a procurement transaction shall solicit, demand, accept or agree to accept from a bidder, offeror, contractor or subcontractor any payment, loan, subscription, advance, deposit of money, services or anything of more than nominal or minimal value, present or promised, unless consideration of substantially equal or greater value is exchanged. The public body may recover the value of anything conveyed in violation of this section.

§ 11-76. Disclosure of subsequent employment.

No public employee or former public employee having official responsibility for procurement transactions shall accept employment with any bidder, offeror or contractor with whom the employee or former employee dealt in an official capacity concerning procurement transactions for a period of one year from the cessation of employment by the public body unless the employee or former employee provides written notification to the public body, or a public official if designated by the public body, or both, prior to commencement of employment by that bidder, offeror or contractor.

§ 11-77. Gifts by bidders, offerors, contractors or subcontractors.

No bidder, offeror, contractor or subcontractor shall confer upon any public employee having official responsibility for a procurement transaction any payment, loan, subscription, advance, deposit of money, services or anything of more than nominal value, present or promised, unless consideration of substantially equal or greater value is exchanged.

§ 11-78. Kickbacks.

A. No contractor or subcontractor shall demand or receive from any of his suppliers or his subcontractors, as an inducement for the award of a subcontract or order, any payment, loan, subscription, advance, deposit of money, services or anything, present or promised, unless consideration of substantially equal or greater value is exchanged.

B. No subcontractor or supplier shall make, or offer to make, kickbacks as described in this section.

C. No person shall demand or receive any payment, loan, subscription, advance, deposit of money, services or anything of value in return for an agreement not to compete on a public contract.

D. If a subcontractor or supplier makes a kickback or other prohibited payment as described in this section, the amount thereof shall be conclusively presumed to have been included in the price of the subcontract or order and ultimately borne by the public body and will be recoverable from both the maker and recipient. Recovery from one offending party shall not preclude recovery from other offending parties.

§ 11-78.1 Participation in bid preparation; limitation on submitting bid for same procurement.

No person who, for compensation, prepares an invitation to bid or request for proposal for or on behalf of a public body shall (i) submit a bid or proposal for that procurement or any portion thereof or (ii) disclose to any bidder or offeror information concerning the procurement which is not available to the public. However, a public body may permit such person to submit a bid or proposal for that procurement or any portion thereof if the public body determines that the exclusion of such person would limit the number of potential bidders or offerors in a manner contrary to the best interests of the public body.

§ 11-79. Purchase of building materials, etc., from architect or engineer prohibited.

A. No building materials, supplies or equipment for any building or structure constructed by or for a public body shall be sold by or purchased from any person employed as an independent contractor by the public body to furnish architectural or engineering services, but not construction, for such building or structure or from any partnership, association or corporation in which such architect or engineer has a personal interest as defined in § 2.1-639.2.

B. No building materials, supplies or equipment for any building or structure constructed by or for a public body shall be sold by or purchased from any person which has provided or is currently providing design services specifying a sole source for such materials, supplies or equipment to be used in such building or structure to the independent contractor employed by the public body to furnish architectural or engineering services in which such person has a personal interest as defined in § 2.1-639.2.

C. The provisions of subsections A and B shall not apply in cases of emergency or for transportation-related projects conducted by the Department of Transportation and the Virginia Port Authority.

§11-79.1. Certification of compliance required; penalty for false statements.

A. Public bodies may require public employees having official responsibility for procurement transactions in which they participated to annually submit for such transactions a written certification that they complied with the provisions of this article.

B. Any public employee required to submit a certification as provided in subsection A of this section who knowingly makes a false statement in such certification shall be punished as provided in §11-80.

§11-79.2. Misrepresentations prohibited.

No public employee having official responsibility for a procurement transaction shall knowingly falsify, conceal, or misrepresent a material fact; knowingly make any false, fictitious or fraudulent statements or representations; or make or use any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry.

§ 11-80. Penalty for violation.

Willful violation of any provision of this article shall constitute a Class 1 misdemeanor. Upon conviction, any public employee, in addition to any other fine or penalty provided by law, shall forfeit his employment.